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IN THE

# Supreme Court of the United States

**October Term, 1962**

**No. 158**

BUDGET DRESS CORP.,

*Petitioner,*

*against*

JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK and its Constituent Locals, and CHARLES S. ZIMMERMAN, NATHANIEL M. MINKOFF and LEON NAMENWIRTH, individually and as General Manager, Secretary-Treasurer and President respectively, of the JOINT BOARD OF DRESS AND WAISTMAKERS' UNION OF GREATER NEW YORK; THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION AFL-CIO; and THE POPULAR PRICED DRESS MANUFACTURERS' GROUP, INC.,

*Respondents.*

## Respondent's Brief in Opposition to Petitioner's Application for a Writ of Certiorari

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*Respondents.*

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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### Opinions Below

Petitioner seeks to review the judgment of the Court of Appeals for the Second Circuit unanimously affirming a summary judgment in favor of Respondents and against Petitioner. The opinion of the District Court (R. 54a-68a), is reported at 198 F. Supp. 4. The opinion of the Court of Appeals (Petition, Appendix A, pp. 1a-2a) is reported at 299 F. 2d 936.

## Jurisdiction

Jurisdiction of this Court is bottomed on 28 U. S. C. Section 1254(1). The judgment sought to be reviewed is dated March 9, 1962 and was entered on said date. No application was made for a rehearing and no extension of time was granted within which to petition for certiorari.

## The Questions Presented for Review

The first two questions which the petition presents for review lack validity. This is so because they assume facts which were thoroughly disproved in the Courts below by documentary evidence, and contain alleged "concessions" which were never made by Respondents and which are not supported in the Record. We believe that this Court will not review hypothetical questions of law based on statements of hypothetical facts.

The third question which the petition presents for review also lacks validity in the circumstances of this case for the reasons hereinafter stated.

## The Statute Involved

The pertinent provisions of Section 302 of the National Labor Relations Act, as amended (29 U. S. C. § 186) are set forth in the Appendix annexed to this brief (pp. 1b-2b).

## Statement

Petitioner (hereinafter referred to as "Budget") is a dress jobber. It was in contractual relations for more than 20 consecutive years with Respondents Joint Board of Dress and Waistmakers' Union of Greater New York and its parent body, International Ladies' Garment

Workers' Union (hereinafter collectively referred to as the "Union"), by reason of its membership in The Popular Priced Dress Manufacturers' Group, Inc. (hereinafter referred to as the "Association"), to which it and other members of the Association had delegated the power to negotiate collective agreements on their behalf and had agreed to be bound by the agreements finally consummated (R. 25b-26b; 145b-146b; 16a). It resigned from the Association in December 1957 but continued to be bound under its agreement with the Union until January 31, 1958.

During all of this time, Budget employed *in its own shop on its own premises,* cutters, operators and finishers over whom it had direct control (Ex. 43[1]; R. 104b-105b; 119b; 146b-148b). It engaged these workers; it assigned the work to them; it supervised them to insure that the dresses they worked on were made in accordance with prescribed specifications; it had the right to fire them for cause; it paid them their wages directly. However, Budget manufactured the bulk of its production in the shops of contractors.

**Provisions of the Collective Agreements Pertinent to this Proceeding**

The collective agreements under which Budget was bound provided, among other things, that

(a) a jobber could also manufacture its garments in the shops of contractors but only in such shops as were in contractual relations with the Union,[2] and only in so many of them as it actually required. All that the jobber

[1] The exhibits submitted by Respondents to the District Court and to the Court of Appeals are contained in a separately bound photographic album. A copy thereof has been filed with this Court and constitutes part of the Record (R. 113b). Reference to the exhibits contained therein is made as "Ex." followed by the number of the exhibit in this bound volume.

[2] Ex. 4, p. 6; Ex. 5, p. 6.

was required to do was designate them with the Union.[3] Contractors were forbidden to sub-contract;

(b) a jobber was required, when there was insufficient work to supply all of the workers in its inside shop and in the shops of its permanent union contractors with full time employment, to distribute the work equitably to and among them;[4]

(c) a jobber was required to pay to the Health and Welfare Fund, which was created by the 1944 collective agreement, and to the Retirement Fund, which was created by the 1947 collective agreement, a stated percentage of the payrolls of the workers employed in its inside shop and in the shops of its contractors.[5] Different trade unions use different measuring rods as a basis for fixing the amount of the employer's liability. The Mine Workers Fund measures the obligation by a fixed royalty per ton of coal mined;[6] the Restaurant Workers Fund by a fixed sum per month per full time employee;[7] and the Bakery and Confectionery Workers Fund by a specified sum for each hour worked.[8] In this regard, Congress imposed no limitation upon the parties to a collective agreement. It left them free to select any measuring rod upon which they could agree.

Although the parties, by the collective agreement, undertook to establish the basis of the jobber's obligation to the Funds, they recognized that this basis might prove

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[3] Ex. 4, p. 12; Ex. 5, p. 12.

[4] Ex. 4, p. 16; Ex. 5, p. 16.

[5] Contractors were not required to contribute to the Funds (except where they manufactured garments for non-union jobbers, in which event, they were required to make the same percentage payments which the jobber would otherwise have been required to make) nor were the workers in the shops of jobbers, manufacturers or contractors required to make contributions thereto (R. 40b).

[6] *Lewis* v. *Hixson*, 174 F. Supp. 241 (WD Ark.).

[7] *U. S.* v. *Embassy Restaurant, Inc.*, 359 U. S. 29.

[8] *Klein* v. *Cross*, 319 P. 2d 471 (Cal.).

unworkable. Accordingly, they empowered the Impartial Chairman to determine a different basis by providing that payments to the Funds be

> "computed, reported and made in the manner to be promulgated by Harry Uviller, Esq., as Impartial Chairman, which promulgation when made, shall be deemed incorporated herein, made a part hereof and binding upon each member of the Association."[9]

Pursuant to this provision, the Impartial Chairman issued his promulgations (Exs. 9, 10, 11 and 12), in which he required that jobbers and manufacturers pay to the Funds a stated percentage of *wages paid to workers in their inside shops* and a lesser stated percentage on the *total payments* (inclusive of wages, overhead and profit) *made by them to their contractors.*[10] This, then, became the basis of the jobber's obligations to the Funds and the measuring rod by which the amount of the obligation was to be arithmetically computed;

d) The Union was named as the proper party in interest to enforce payments due to the Funds.[11] All monies paid over to the Union by Budget, for the benefit of the Funds, were turned over to the Funds (Ex. 18). Budget does not contend otherwise;

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[9] Ex. 5, p. 32. See also Ex. 4, p. 30.

[10] Ex. 43 consists of the two sets of reports which Budget was required to submit to the Funds each month. These show clearly the two separate bases upon which Budget made payments to the Funds. One set of reports covered the workers in its inside shop. It set forth the name, craft, social security number and weekly wage of each worker employed by it. Payments to the Funds were computed upon the agreed percentage of the wages paid to these workers. The other set of reports merely shows the total amounts paid by Budget to its contractors and the payments made to the Funds thereon based upon the percentage of total payments fixed in the promulgations of the Impartial Chairman.

[11] Ex. 4, p. 34; Ex. 5, p. 38.

(e) the Union had the right to examine a jobber's books once a month to ascertain whether such jobber was fully complying with the agreement;[12] and

(f) all complaints, disputes or grievances involving questions of interpretation or application of the agreement or any acts, conduct or relation of the parties were to be submitted to arbitration before Harry Uviller, Esq., as Impartial Chairman, and his decision was final and binding.[13]

**The Payments in Issue**

Over the years, Budget utilized the services of many union contractors, both permanent and temporary, and made innumerable payments to the Funds on total payments made to these contractors, in accordance with the promulgations of the Impartial Chairman. However, this case actually involves only three payments.

1. The first payment is the subject of the first cause of action in Budget's complaint (R. 2a-5a). It concerns an alleged payment of $49,000[14] to the Funds which was calculated on the total payments made by Budget to certain *non-union* contractors during the period March 1954 through May 1957. That payment was made under the following circumstances:

In May, 1957, after Budget's strenuous efforts in the courts to evade examination of its books and records had met with defeat (R. 67b-70b), the Union finally examined them. It was ascertained that Budget, in violation of the collective agreement, had manufactured tens of thousands of its garments in the shops of non-union contractors, in-

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[12] Ex. 4, p. 36; Ex. 5, p. 43.

[13] Ex. 5, p. 42; Ex. 5, p. 49.

[14] It is conceded that the claimed payment of $49,000 is incorrect and that the actual payment made was $44,000 (R. 162b-165b; 177b; 183b; 185b; Exs. 25, 26, 27 and 28).

cluded among which were State Fabrics and Sano Textile, and had concealed the payments made to these non-union contractors by listing them in its books of account under the heading "Materials Purchased". Of course, Budget had made no payments to the Funds on this production.

The Union filed complaints against Budget (Exs. 14, 23, 24) pursuant to the arbitration provision of the collective agreement (Ex. 5, p. 49), demanding a total of $76,384.26 claimed to be due to the Funds.

While hearings were pending, Budget and the Union entered into a stipulation (Ex. 25), in which Budget expressly recognized and affirmed the jurisdiction of the Impartial Chairman and authorized him to determine the amount and the manner in which payment thereof was to be made.

Thereupon, the Impartial Chairman, on October 1, 1957, rendered an award (Ex. 26) directing Budget to pay to the Union, for the benefit of the Funds, the sum of $49,000, of which $25,000 was to be paid immediately and the balance of $24,000 in 24 monthly installments of $1,000 each to be paid on the 15th day of each and every month commencing November 15, 1957, to be evidenced by 24 promissory notes. Following a personal appeal by Rosengarten, the Secretary-Treasurer of Budget, the Impartial Chairman decreased the award to $44,000 and reduced the initial payment to $20,000. This was consented to (Ex. 27). Budget made the down payment of $20,000 by certified check payable to the order of "Health & Welfare Fund" (Ex. 28) and delivered its 24 promissory notes to the Union. Each of these notes was paid and the proceeds thereof received by the Funds (R. 67b-79b; Ex. 18F).[15]

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[15] The instant action was commenced on August 6, 1959 (R. 1a). On that date, at the latest, Budget had advanced its claim that the payments were illegal. It is the measure of Budget's bad-faith that it voluntarily paid the notes due on August 15, September 15 and October 15, 1959, *after* the claim of illegality had been asserted. These payments were actually received by the Funds on August 21, September 21, and October 29, 1959 (Ex. 18F).

2. The second payment is the subject of both causes of action in Budget's complaint.[16] It concerns an alleged payment of $22,000[17] to the Funds which was calculated on the total payments made by Budget to its *union* contractor, Harvic Sportswear Co., for the period June 1957 through January 31, 1958, and was made under the following circumstances:

An examination of Budget's books made *after* January 31, 1958, but limited to the period ending January 31, 1958 (the date after which Budget was no longer bound by the collective agreement), disclosed that Budget had failed to make proper payments to the Funds on total payments made by it to Harvic Sportswear for the period June 1957 through January 1958. Accordingly, the Union filed an additional complaint against Budget. It demanded payment of the sum of $18,535.21 claimed to be due to the Funds on total payments made by Budget to Harvic for this period.

On September 30, 1958, the Impartial Chairman rendered an award (Ex. 29), requiring Budget to pay to the Funds the sum of $17,480.97. By order and judgment dated April 16, 1959 (R. 80b-82b; Ex. 30), the award was confirmed by the New York Supreme Court. Budget appealed therefrom to the Appellate Division, First Department. However, it did not prosecute its appeal and on motion of the Union the appeal was dismissed on September 17, 1959 (R. 79b-82b, 94b; Ex. 31).

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[16] The award of the Impartial Chairman and the judgment of the New York Supreme Court confirming the award were rendered before the institution of this action. However, the judgment was not paid until after this action was commenced, and then only after an application for an injunction under the second cause of action herein had been denied under circumstances hereinafter set forth. By consequence, it is the subject of both causes of action.

[17] It is conceded that the claimed payment of $22,000 is incorrect and that the actual payment made was $17,480.97 (R. 177b; 183b; 185b; Exs. 29, 30, 31 and 33).

In the interim, and on August 6, 1959, Budget commenced the instant action in the United States District Court for the Southern District of New York. After dismissal of Budget's state court appeal, the Union made demand upon the surety on Budget's appeal bond for payment of the judgment. Budget thereupon moved in the present action for an injunction, under the second cause of action in the complaint, to prevent payment of the judgment by the surety on the ground that such payment constituted a violation of Section 302(a) and (b) of the Taft-Hartley Act. Chief Judge Ryan denied the injunction in an opinion reported at 178 F. Supp. 699. Budget appealed therefrom to the Court of Appeals. After Judge Ryan had denied a motion for a stay pending appeal (R. 83b), and the Court of Appeals for the Second Circuit had denied a similar motion (R. 84b; Ex. 32), Budget abandoned its appeal and the surety issued its check in payment of the judgment (R. 84b; Ex. 33). As the Funds' ledger sheets indicate, this payment was received by the Funds (R. 79b-86b; Ex. 18H).

3. The third payment is the subject solely of the second cause of action in Budget's complaint. It concerns a payment of $13,759.49 to the Funds which was calculated on total payments also made by Budget to Harvic Sportswear Co., its *union* contractor, for the months of January 1955 to June 1957. Here again discovery of the failure to make the payments due to the Funds took place after the collective agreement had expired. The Union filed its complaint which was heard by the Impartial Chairman, after a motion to stay arbitration had been denied and an appeal therefrom to the Appellate Division, First Department, had been dismissed (R. 93b-94b). On June 29, 1959, the Impartial Chairman rendered his award (Ex. 38), requiring Budget to pay to the Funds the sum of $13,759.49. The Union moved, in the New York Supreme Court, to confirm the award. Budget removed that proceeding to the federal court. The Union's motion to remand to the state court was granted (180 F. Supp. 818). On the evening before the Union's renewed motion to confirm the

award came on to be heard in the New York Supreme Court, Budget filed an unfair labor practice charge with the National Labor Relations Board against the Union (Ex. 40), and on the basis thereof, cross-moved in the state court for a stay (Ex. 39). It also opposed confirmation of the award upon the ground, among others, that the payment required to be made by the award violated Section 302(a) and (b) of the Taft-Hartley Law. On May 10, 1960, the motion to confirm was granted and the cross-motion to stay denied (N. Y. L. J., May 11, 1960, p. 12, col. 4; Ex. 41). Budget's unfair labor practice charge was shown to be spurious and Budget withdrew it (Ex. 42; R. 88b-98b).

Budget appealed to the Appellate Division, First Department, from the judgment of confirmation, relying *solely* upon the claim that the payment required to be made by the judgment violated Section 302(a) and (b) of the Taft-Hartley Law.[18] The judgment was unanimously affirmed (12 App. Div. 2d 905 [N. Y.], 214 N. Y. Supp. 2d 242). Leave to appeal to the New York Court of Appeals was denied first by the Appellate Division (13 App. Div. 2d 641 [N. Y.], 215 N. Y. Supp. 2d 1012; 13 App. Div. 2d 751 [N. Y.], 216 N. Y. Supp. 2d 659) and then by the Court of Appeals (9 N. Y. 2d 613). Thereupon, the judgment was paid.

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[18] The briefs submitted to the Appellate Division by Petitioner and the Union were before Chief Judge Ryan when he decided the motion for summary judgment. Since Respondents did not have additional copies of Petitioner's brief, Respondents submitted only 3 copies of the Union's Appellate Division brief to the Circuit Court of Appeals. We submit, together with this brief, three copies of that brief to this Court. Page 2 of that brief indicates that Budget, in its statement of the issues on appeal, limited itself *exclusively* to a discussion of whether the payment required to be made by it to the Funds violated Section 302 of the Taft-Hartley Act.

**Budget's Misstatement of the Record**

Budget, apparently, has now abandoned the claim advanced by it in the Courts below that issues of fact exist in this case. However, in the effort to find some basis for the question of law which it seeks to advance, it misstates, in its Petition much of the documentary evidence, it ignores the concessions made by its officers upon the taking of their depositions, and it completely garbles the stipulation made by Respondents.

1. Budget states that the Union "acknowledged below that none of the employees upon whose toil and wages the payments demanded and received were based could derive benefits from any health and welfare funds administered by the Union" (Petition, pp. 4-5), and that the employees of the paying employer [*i. e.* Budget] were not beneficiaries of the Funds (Petition, p. 10).

(a) In the first place, as we have already shown, Budget concededly made payments to the Funds on the wages of the workers in its inside shop. All of the workers in the crafts covered by the collective agreement employed directly by Budget in its inside shop were "covered workers" employed by a "covered employer" as those terms are defined in the Rules and Regulations of the Funds.[19] As such they were entitled to and, in fact, did receive all of the benefits for which they were eligible. Budget does not contend otherwise. Consequently, Section 302(c)(5) was fully satisfied because the monies collected from Budget were used to provide benefits for its own employees, directly employed in its inside shop.

The Funds also extended benefits to all workers in the crafts covered by the collective agreement who were eligible therefor who were employed in the shops of contractors in contractual relations with the Union. These workers are also defined as "covered workers" in the Rules and

[19] Ex. 7, pp. 3-4; Ex. 8, pp. 3-4.

Regulations of the Funds and their employers are defined as "covered employers". The reason for doing so is that the collective agreement gives special protection to the workers employed in the shop of a union contractor. It imposes responsibility on the union *jobber* (a) for payment of the guaranteed minimums payable to all piece workers in the shops of his union contractors (Ex. 4, p. 27; Ex. 5, p. 28); (b) for payment of wages to the workers in the shops of his union contractors provided that such responsibility is limited to wages for one full week and two days and provided further that notice of default is given within three days after default in payment of such wages by the union contractor (Ex. 4, p. 27; Ex. 5, p. 28); and (c) for under-payments in wages due from the union contractor to his workers (Ex. 4, pp. 27-28; Ex. 5, pp. 28-29). It is, therefore, eminently fair and proper that the Fund should also give special protection to the workers employed in the shops of union contractors by providing benefits for them. Thus, the workers in the shops of Budget's *union* contractors, *i.e.*, the workers in the shops of A. Kelmar, Max Stone and Harvic Sportswear Co., were "covered workers" employed by "covered employers" and they became entitled to and did receive benefits from the Funds (R. 119b, 133b).

All other payments which Budget made to the Funds were not based on the wages of the workers in its contractors' shops, but, as we have shown, were made on the total payments which Budget paid to each of its contractors, in accordance with the promulgations of the Impartial Chairman, and without regard to the wages earned by the workers in its contracting shops.

Concededly, the workers in Budget's contracting shops were not Budget's workers. In his deposition, Rosengarten admitted that none of the workers employed in any of the shops of its contractors were employees of Budget and conceded that they were the employees of the owners of the contracting shops in which they worked (R. 170b-

177b). Budget could not hire or fire them; it could not determine their work load; it could not and did not exercise any degree of supervision over them; it did not pay them their wages or earnings. It did not know the names of the persons employed by any of its contractors and never knew what they earned or what they were paid. In fact, Rosengarten, who was subpoenaed to produce lists of the workers in the shops of State Fabrics and Sano Textile in connection with his deposition, conceded that he did not have any such records and that the lists which he produced he had obtained from the contractors in question only after the subpoena had been served upon him R. 204b-206b). Indeed, as can be seen from the lists of workers of Sano Textile,[20] the wages paid to these workers were blocked out and Rosengarten conceded that they were so blocked out when they were delivered to him (R. 105b-107b). Thus, it is plain that Budget never made payments to the Funds on the wages of the workers in its contracting shops for it never knew what those wages were.[21]

None of the reasons for giving benefits to workers employed in Budget's inside shop exists for giving benefits to workers employed in the shops of its non-union contractors. Since the collective agreement contemplated that the jobber could manufacture his garments only in the shops of union contractors, and for him to do otherwise would be a violation of the agreement for which he would be liable in damages, the jobber was not asked for and did not give similar guarantees with respect to the workers in the shops of his non-union contractors. Moreover, the workers in the shops of non-union contractors who produced garments for union jobbers were actually depriving the workers in union contracting shops of the work, wages and earnings to which they were entitled. It would be patently

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[20] Exs. 46, 47, 48 and 49.

[21] Frank, the President of Budget, conceded that the payments to the Funds were not based on wages paid to workers in Budget's contracting shops (R. 210b-211b).

absurd to give the workers in the non-union contracting shops benefits from the Funds as a premium for that conduct.

Therefore, the workers in the shops of Budget's non-union contractors were not made "covered workers" and were not employed by "covered employers." Hence, they were not entitled to and did not receive benefits from the Funds.

(b) In the second place, the reference to "health and welfare funds administered by the Union" is a patent misstatement. Under the collective agreement (Ex. 5, pp. 34-38), the Funds are set up and administered in strict compliance with Section 302(c)(5) of the Taft-Hartley Law. They are jointly administered by representatives of management and labor and are presided over by a neutral person who is empowered to break deadlocks (R. 32b-33b). The Funds also comply meticulously with all other applicable statutes (R. 31b-40b).

None of the monies of the Funds are used except to pay benefits authorized under Section 302 of the Taft-Hartley Law to eligible workers and to pay the administrative and operating expenses thereof (R. 31b-33b; 134b-135b; Ex. 5, p. 33).

2. Budget states that each month during the term of the agreement it filed with the Union a list showing the contractors with whom it had worked during the previous month and the amount of work done in each contracting shop, together with a check representing *a percentage of the wages earned by the workers* in each contracting shop during such month (Petition, p. 7). This statement is untrue. The reports (Ex. 43) themselves show that Budget never made payments to the Funds *on wages paid to workers in contracting shops,* and that, in fact, it made them *on the total payments* made to the contractors themselves.

3. Budget states that it had obtained the consent of the Union to work with non-union contractors as long as it made payments to the Funds on total payments made to these contractors (Petition, p. 8). Not alone is this statement irrelevant, but it is untrue and is utterly refuted by the documentary evidence.

In 1953, Budget violated the collective agreement by manufacturing its garments in the shop of one La Porta, a non-union contractor. Rather than arbitrate the issue, Budget paid $250 in liquidated damages to the Union and agreed not to violate the collective agreement again (R. 70b-71b; 124b; 211b).

When the Union filed the three complaints seeking an award for the Funds based upon Budget's concealment of its dealings with non-union contractors by denominating in its books of account, payments to them as payments for "Materials Purchased", it also filed a complaint charging Budget with dealing with non-union contractors in violation of Paragraph "Ninth" of the collective agreement and demanded damages. On September 18, 1957, the parties entered into a stipulation (Ex. 34),[22] under which Budget agreed to and did pay the Union liquidated damages of $5,000 and consented to the rendition of an award requiring Budget to cease and desist from further violating the collective agreement and further consented to confirmation of the award and the entry of a decree of injunction restraining such violations. The award was rendered on Oc-

[22] At the time of the entry into this stipulation, Budget informed the Union that it had a substantial number of garments in the machines of its non-union contractors and that to transfer these garments to its union contractors for completion would work irreparable injury upon it. The union, as a special dispensation, permitted Budget to complete these garments and agreed that no claim would be made against it therefor (R. 140b). No claim was ever made by the Union for this period. Out of this special favor Budget attempts to weave its entire argument of "consent".

tober 1, 1957 (Ex. 35) and an order of confirmation and decree of injunction was entered by the New York Supreme Court on October 28, 1957 (Ex. 36).

When, for the third time, the Union ascertained that Budget was violating the collective agreement by having its garments made in the shops of non-union contractors, the Union filed still another complaint against Budget demanding damages. The Impartial Chairman awarded damages to the Union in the amount of $38,650 (Ex. 37). This award was confirmed by the same judgment which confirmed the award in favor of the Funds in the amount of $13,759.49. That judgment was unanimously affirmed by the Appellate Division, First Department (12 App. Div. 2d 905 [NY], 214 N. Y. Supp. 2d 242) and leave to appeal to the New York Court of Appeals was denied (13 App. Div. 2d 641 [NY], 215 N. Y. Supp. 2d 1012; 13 App. Div. 2d 751 [NY], 216 N. Y. Supp. 2d 659; 9 N. Y. 2d 613).

Thus, far from consenting to or condoning Budget's dealings with non-union contractors, the documentary evidence makes clear that the Union sought to use every means available to prevent such violations.

4. Budget contends that the monthly reports filed by it with the Funds evidenced the Union's consent to Budget's dealing with non-union contractors. The first report filed with the Funds which bears the names of non-union contractors was the *supplemental* report for *June* 1957 (Ex. 43). This bears the name of State Fabrics and Sano Textile. Since the $44,000 award to the Funds covers the period ending with *May* 1957, it is plain that the reports included by Budget in its appendix (R. 43a, 53a) are not evidence of any such consent.

But even more important, the documentary evidence, consisting of the reports to the Funds (Ex. 43) and the checks issued in payment of the amounts shown by these reports to be due to the Funds (Exs. 16, 17) affirmatively

disproves any such consent. The complaints (Exs. 14, 23, 24) which resulted in the award of $44,000 (Ex. 26) covered monies due to the Funds for the period March 1954 through May 1957. These complaints were disposed of by the award of October 1, 1957 (Ex. 26). In the interim, Budget continued to operate with its non-union contractors. Thus, on October 1, 1957, Budget owed the Funds the stipulated percentage on total payments made to these non-union contractors for the months of June, July, August and September, 1957. The June, 1957, supplemental report (Ex. 43), and the reports for July and August, 1957, together with the checks in payment of the amounts due as shown by these reports (Exs. 16M, 16N, 16O), were submitted to the Funds in the latter part of October, 1957. The checks are all dated October 20, 1957, and, together with the reports, were received by the Funds within a day or two thereafter. The check covering the payment due to the Funds on payments made to these non-union contractors during September, 1957 (Ex. 16P) is dated October 25, 1957, and was received by the Funds, together with the September report, within a day or two thereafter. This should have terminated Budget's non-union operations.

However, Budget did not cease its non-union operations. To shroud them in secrecy, it delayed its reports for the months of October, November and December, 1957 and January, 1958. These were forwarded to the Funds, together with the checks in payment therefor (Exs. 17A, 17B, 17C) on January 23, January 25, and February 28, 1958.[23] By the time these had been received by the Funds and entered in their records and it was too late for the Union to take action other than to seek damages (R. 141b-142b). This, it did. Thus, the documentary evidence, instead of supporting Budget's claim, actually shows that Budget did not have the consent of the Union to its dealing

[23] The expiration date of the collective agreement was January 31, 1958 (see Ex. 5, p. 53).

with non-union contractors and that, because it did not have the Union's consent, it bent every effort to withhold from the Union the knowledge of such dealings.

Moreover, the reports filed by Budget were filed with the *Funds* not with the Union. The material contained in these reports would not and did not come to the Union in the normal course until long after the receipt thereof by the Funds.

But even if the Union had consented to Budget's dealing with non-union contractors (which it did not), and such consent had something to do with the Funds, the only effect thereof would be that in a suit brought by a *worker* employed by any of these non-union contractors to recover benefits from either of the Funds, the Union would be estopped to assert that these non-union contractors were not "covered employers" and these workers then would be entitled to benefits from the Funds (R. 142b). Such a suit, however, could not be brought at the instance of Budget.

5. Budget states that the Union has conceded that (a) the employees were not covered workers; (b) they were not employed by covered employers; and (c) the employees for whom payments were made were not eligible to receive benefits from the Fund (Petition, p. 13). The Union made no such concession. The Record shows that the workers in Budget's inside shop and the workers in the shops of its union contractors were "covered workers" employed by "covered employers" and were eligible for benefits from the Funds and, in fact, did receive all of the benefits to which they were entitled.

The Union did make a stipulation. It is plain, clear and concise and appears at pp. 131b-132b of the Record. It is quite different from Budget's version of it. It was made under the following circumstances: On its appeal to the Appellate Division from the judgment confirming

the Arbitrator's award in the sum of $13,759.49, and upon the oral argument of the motion for summary judgment herein before Chief Judge Ryan, Budget, in the endeavor to raise an issue of fact, contended that although the amounts found to be due to the Funds were paid on total payments made by Budget to Harvic, *its union contractor*, Harvic had subcontracted the work given to it by Budget to non-union contractors, whose workers were not covered workers, and, therefore, Budget's payments to the Funds on the total payments which it made to Harvic were illegal. To obviate the claim that this created an issue of fact, the Union, upon the oral argument of the motion for summary judgment and in its rejoinder affidavit (R. 131b-132b), requested the Court to assume (although it did not concede this to be a fact) that "so far as concerns the two awards in favor of the Funds for $17,480.97 and $13,759.49, based upon total payments made by plaintiff to Harvic, Harvic subcontracted the work given to it by plaintiff to non-union contractors. So far as concerns the award for $44,000, [the Union] requested the Court to assume that this award was based upon total payments made by plaintiff directly to non-union contractors. The Court was further requested to assume that the workers in the shops of these *non-union* contractors were not 'covered workers' and were not employed by 'covered employers', and that, as a result thereof, these workers were not eligible to receive benefits from the Fund." The Union never stipulated that the workers in *Budget's inside shop* and the workers in its *union contracting shops* were not entitled to benefits . As demonstrated by the Record, not only were they "covered workers", entitled to receive such benefits (R. 133b) but, in fact, they did receive them.

## ARGUMENT

### I. The courts below properly held that none of the payments made by Budget to the Funds violated Section 302(a) or (b) of the Taft-Hartley Act and that they were exempt therefrom under the provisions of Section 302(c)(2) and (5) thereof.

Budget contends that the three payments made by it to the Funds were illegal because they were made on behalf of workers in the shops of its non-union contractors and Harvic's non-union sub-contractors who were not entitled to receive benefits from the Funds. The Union, on the other hand, contends that the payments made were made on behalf of the workers in Budget's inside shop and in the shops of its union contractors—all of whom were "covered workers" as defined in the Rules and Regulations of the Fund. Those payments were to be used jointly with payments of all other "covered employers" making similar payments to provide benefits to their workers. The basis of the payments, i.e., the specified percentage of the wages of the workers in the inside shop and the specified percentage of total payments made to contractors, as set forth in the promulgations of the Impartial Chairman (Exs. 9, 10, 11, 12), was merely a measuring rod to determine arithmetically the precise amount which jobbers were required to pay to these pooled Funds to provide benefits for workers employed in their inside shops and employed by their contractors in union shops.

Congress, when it enacted Section 302, was concerned with practices which violated the integrity of the collective bargaining process. Its purposes were dual. It sought, on the one hand, to protect employers against extortion, and, on the other hand, to insure honest representation to employees (*Arroyo* v. *United States*, 359 U. S. 419; *U. S.* v. *Annunziato*, 293 F. 2d 373 [C. A. 2]).

Although Congress' intention was to insure collective bargaining at arm's length, it recognized that, standing alone, Section 302(a) and (b) would completely disrupt the normal labor-management relationship. To guard against such interference, Congress enacted Section 302(c) which specifies the types of payments which are exempt from the prohibition of Section 302(a) and (b).

The payments here involved fall within two of the exemptions specified in Section 302(c). They are, therefore, legal and valid payments.

1. All three of the payments which form the basis of Budget's suit were made to the Funds in satisfaction of awards of an Impartial Chairman. Two of these awards were confirmed by separate judgments of the New York State Supreme Court. Hence, all of the payments here involved fall within the express ambit of Section 302(c)(2). This, without more, disposes of Budget's contention.

2. Section 302(c)(5) legalizes the payment of monies to trust funds established for the purpose of paying health and welfare benefits and retirement benefits provided that the trusts meet certain conditions. The uncontroverted and incontrovertible facts establish that, however the statute may be parsed, each of the Funds here involved meets each requirement of the statute. Payments made by Budget were held in trust for the sole and exclusive benefit of the workers employed in Budget's inside shop and for the workers of A. Kelmar, Max Stone and Harvic Sportswear Company, Budget's union contractors, jointly with the employees of other employers making similar payments. The payments were used only for the purposes authorized by law (Ex. 5, pp. 33-34). The detailed basis upon which payments were made by the Funds is set forth in the collective agreement and the Rules and Regulations which, together, constitute the written instrument (*Van Horn* v. *Lewis*, 79 F. Supp. 541 [DC DC]. The employees and employers were represented equally in the administration of

the Funds. The Impartial Chairman was designated as the neutral person empowered to break deadlocks. Provision was made for an annual audit and the payments used for the purpose of providing retirement benefits was held in a separate trust which could not be used for any other purpose.

Thus, every single requirement of Section 302(c)(5) is satisfied. Moreover, the Funds comply meticulously with every other statute, state and federal, applicable to them. (R. 32b-33b)

When Congress enacted Section 302, it prescribed standards to assure that welfare funds would be established only for the purposes which Congress considered proper and expended only for the purposes for which they were established.[24]

The validity of the very Funds here in question was involved in *Minkoff* v. *Scranton Frocks* (181 F. Supp. 542 [S. D. N. Y.], aff'd on opinion of the court below, 279 F. 2d 115 [C. A. 2]). There an award in favor of the Funds was attacked upon the very grounds here urged. Counsel for the respective parties were the same, the Rules and Regulations governing eligibility were the same and the facts were substantially similar. In confirming the awards, the Court there held:

> "• • • the Funds here involved can by no stretch of the imagination be considered anything other than legitimate plans to provide benefits for employees in the dress industry covered by the collective bargaining agreements." (181 F. Supp. at p. 549)

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[24] During the debates, Senator Taft stated (93 Cong. Rec. 4876, May 8, 1947): "the purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purpose shall be stated so that each employee can know what he is entitled to, can go to court and enforce his rights in the fund, and that it shall not be, therefore, in the sole discretion of the union or the union leaders and usable for any purpose that they may think is to the advantage of the union or the employee."

The reasons for the legality of Budget's payments to the Funds are multiple.

First: The Record shows that the Funds herein have been set up and are administered in meticulous compliance with Section 302(c)(5) of the Taft-Hartley Act.

Second: Payments to a fund which meet the requisite criteria of Section 302(c)(5) of the Taft-Hartley Act are legal because it is so provided therein; when made in satisfaction of a judgment of any court or a decision or award of an Impartial Chairman or Arbitrator they are legal because Section 302(c)(2) of the Taft-Hartley Act so provides.

Third: Budget's obligation under the collective agreement required it to deal only with contractors in contractual relations with the Union, *i.e.*, union shops. *Budget's argument of illegality is based on the unique—indeed, the almost incredible—claim that, because it deliberately violated its contractual obligation not to deal with non-union contractors, it thereby acquired immunity from paying to the Funds on the ground that its breach of the agreement rendered payments to the Funds illegal.* This argument has heretofore been properly rejected by the courts (*Greenstein* v. *National Skirt & Sportswear Association, Inc.*, 178 F. Supp. 681 [S. D. N. Y.]; *Kreinder* v. *Clarise Sportswear Co.*, 184 F. Supp. 182 [S. D. N. Y.]; see also *Lewis* v. *Mill Ridge Coals, Inc.*, 188 F. Supp. 4 [E. D. Ky.], aff'd. 298 F. 2d 552 [C. A. 6]).

*Matter of Larry Jay, Inc.* [Joint Board of Dress and Waistmakers' Union of Greater New York], 3 App. Div. 2d 386 [N. Y.], aff'd 4 N. Y. 2d 912), mentioned on pages 15 and 16 of Budget's petition, has nothing to do with the situation here involved nor does it stand for the proposition for which it is cited. That case does not protect "the wages of non-union contractor(s)". It involved a jobber in con-

tractual relations with the Union who had regularly designated a union contractor who worked exclusively for him and was not permitted to work for anyone else. The jobber guaranteed the payment of wages to workers of the union contractor in the event of the latter's default in such payment. None of these factors are present in this case. The workers in the shops of Budget's non-union contractors and in the shops of Harvic's non-union sub-contractors would have no rights against Budget or Harvic, respectively, if these contractors or sub-contractors defaulted in the payment of wages or in the performance of any other obligation.

Fourth: The Funds herein are pooled funds, and the rights of workers accrue only as they meet the eligibility requirements of the Rules and Regulations. There is nothing illegal about pooled funds (*Minkoff* v. *Scranton Frocks*, 181 F. Supp. 542 [S. D. N. Y.], aff'd on opinion of the Court below, 279 F. 2d 115 [C. A. 2]). Section 302(g) expressly takes cognizance of pooled funds by exempting from the restrictions of Section 302(c)(5)(A) funds in existence prior to January 1, 1947, which provide for "pooled vacation benefits".

Fifth: Budget confuses payments required to be made to the Funds with payment of benefits by the Funds to eligible workers entitled thereto. *Neither has anything to do with the other.* The requirement that payments to the Funds be made on the basis of a specified percentage of wages paid by jobbers and manufacturers to workers in their inside shops and a lesser specified percentage of total payments made by jobbers and manufacturers to their contractors merely fixes the *extent* and the *amount* of an employer's obligation. It constitutes a measuring rod for the computation of that obligation.

As the Court noted in *Klein* v. *Cross* (319 P. 2d 471 [Cal.]):

> "The employer's obligation to pay is measured by the hours worked, not by the benefits an employee may receive."

The parties to a collective agreement are free to select any measuring rod upon which they agree. Congress imposed no limitation thereon (cf. *Greenstein* v. *National Skirt and Sportswear Association*, 178 F. Supp. 681 [S. D. N. Y.]). Had the parties in this case so desired, they could have based the payments to be made to the Funds by Budget on the number of dresses manufactured, or the number of needles or spools of thread used, or even the number of decisions to be written by this Court in any given period of time. Congress left them free to use any basis upon which they agreed to fix the extent of the obligation of the employer to pay to the funds.

Sixth: The right to receive benefits from the Funds is *not* contingent upon union membership (pp. 33b-38b). Indeed, it cannot be made so under the Taft-Hartley Act (*Jandel Furs*, 100 NLRB 1390; *Local 138, International Union of Operating & Engineers*, 123 NLRB 1393; *Motion Picture Operators Union of Essex County, Local 244*, 126 NLRB 376; *Indiana Gas and Chemical Corp.*, 130 NLRB 1488; *NLRB* v. *Local 815, IBT*, 290 F. 2d 99 [C. A. 2]; *Lewis* v. *Hixson*, 174 F. Supp. 241 [W. D. Ark.]; *Minkoff* v. *Scranton Frocks*, 181 F. Supp. 542 [S. D. N. Y.]; aff'd on the opinion of the Court below, 279 F. 2d 115 [C. A. 2]). The right of a worker in the dress industry to receive benefits from these Funds depends on his employment in one of the crafts covered by the collective agreement, by a "covered employer", i.e., an employer in collective agreement with the Union, and upon his meeting other eligibility requirements not here germane. A worker who meets these eligibility requirements is entitled to receive benefits

equally with all other workers who meet those eligibility requirements, *whether or not he is a union member.* If an award of benefits is improperly denied to an applicant who is entitled thereto, the applicant has an absolute and complete remedy. He may bring suit to recover the benefits to which he is entitled (*Hobbs* v. *Lewis*, 159 F. Supp. 282 [D. C. D. C.]; *Ruth* v. *Lewis*, 166 F. Supp. 346 [D. C. D. C.]; *Harper* v. *Lewis*, 186 F. Supp. 285 [D. C. D. C.]; *Szuck* v. *Lewis*, 193 F. Supp. 831 [D. C. D. C.]; *Forrish* v. *Kennedy*, 377 Pa. 370) and in appropriate case, he may file an unfair labor practice charge under Section 8 of the Taft-Hartley Act[25] (*NLRB* v. *Local 815, IBT*, 290 F. 2d 99 [C. A. 2]; *Indiana Gas and Chemical Corp.*, 130 NLRB 1488). However,

> "The validity of the agreement is not affected by any conduct or practice of the parties which would constitute an unfair labor practice * * *. At most, such conduct or practice, not authorized by the agreement itself, would show that the Union and [the employer] violated applicable law. It would not alter or change the terms of the agreement."
>
> *Lewis* v. *Quality Coal Corporation*, 270 F. 2d 140, 143 [C. A. 7], cert. den. 361 U. S. 929.

And it is the agreement which fixes the obligation to pay (*Klein* v. *Cross*, 319 P. 2d 471 [Cal.]) By consequence, the payments to the Funds here involved are not barred by Section 302.

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[25] 29 U. S. C. § 158.

**II. The motion for summary judgment was not premature. It was timely made and was properly entertained.**

Budget's contention that the motion for summary judgment was prematurely granted is without merit. It is bottomed on the claim that the motion was made after the Union had taken the deposition of Budget but before Budget had an opportunity to take the deposition of respondents.[26] But the examination of respondents by Budget could have added nothing. Every shred of documentary evidence relating to this case was produced either by Budget or by the Union and was identified and marked. No other documents exist.

The motion for summary judgment was based exclusively on these documents, the admissions made by Budget in its deposition and upon the undenied statements in the affidavits in support of the motion. All the evidence conceivably relevant to this case was before the District Court when it decided the motion for summary judgment. That evidence could not have been altered one iota by the examination of respondents on relevant matters and the examination of respondents on irrelevant matters could not have changed the outcome of the motion for summary judgment. And the relevant evidence establishes, beyond peradventure of any doubt, that no question of fact exists in this case.

Budget's argument on the question of prematurity poses sharply the question "What are the relevant matters which it expected to establish by the depositions of respondents"? Budget itself has furnished the answer. In the affidavits submitted by it in opposition to the motion for summary judgment (R. 13a-14a; see also 12a-13a; 29a-30a) and in its petition to this Court (p. 24), it asserts only that it would

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[26] Respondents, having served their notices to take Budget's deposition first, were entitled to priority in examination and the Court below so held on Budget's motion for priority.

establish specific instances of the denial of benefits to the employees of Budget's non-union contractors. But, Joint Board stipulated (R. 131b-132b) for the purpose of the motion for summary judgment only, that the Court could assume that Budget's non-union contractors were not "covered employers" and that their employees were not "covered workers", and, hence, none of these employees was entitled to benefits from the Funds. With this stipulation there was established all that Budget, by its own claim, hoped to establish by examining respondents. Accordingly, the existence or non-existence of specific instances of denial of benefits becomes wholly irrelevant.

*Lewis* v. *Mill Ridge Coals, Inc.* (298 F. 2d 552 [CA 6]), presented a situation similar to the one at bar. There the defendants sought a continuance of the motion for summary judgment under Rule 56(f) of the Federal Rules of Civil Procedure for the purpose of taking the deposition of plaintiff to support their contention that the payments required to be made to the Welfare and Retirement Fund of the United Mine Workers were illegal. Since the money due to the Fund was required to be paid as a matter of law, and the obligation to pay could not be altered by the taking of plaintiff's depositions, the Court denied the continuance and granted the motion for summary judgment.

Here, there was not involved any complicated course of legislation, contracting or practice, depending for its construction on inferences drawn by the Court (*cf. Kennedy* v. *Silas Mason Co.*, 334 U. S. 249), or questions of credibility revolving about the weight to be accorded to the testimony of expert witnesses (*cf. Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620), or a complex antitrust litigation where motive and intent play leading roles and proof is largely in the hands of the alleged conspirators (*cf. Poller* v. *Columbia Broadcasting System*, — U. S. —, 7 L. ed. 458). Here, there was not involved a "trial by affidavit" turning on the credibility of the affiants (*cf. Colby* v. *Klune*, 178 F. 2d 872 [C. A. 2]). Here the material

facts were established by incontrovertible documentary evidence and concessions and admissions made by Budget on its deposition. The sole issue remaining was one of law.

Since respondents in this case had fully established the absence of any genuine issue as to the material facts, they were entitled to judgment as a matter of law. It is plain, therefore, that the motion for summary judgment was not prematurely made. The District Court properly granted it and the Court of Appeals properly unanimously affirmed the judgment of the District Court.

## III. Budget's action is barred by the doctrines of *res judicata* and collateral estoppel.

The doctrines of *res judicata* and collateral estoppel were raised in the District Court and were held inapplicable (R. 64a-65a). The Court of Appeals, approving the disposition of the Court below on the merits, did not concern itself with this question. We respectfully submit, however, that these doctrines furnish an additional basis for sustaining the granting of summary judgment.

Although the authority to confirm the awards for $17,480.97 and $13,759.49 is derived from federal law [27] (*Textile Workers' Union of America* v. *Lincoln Mills*, 353 U. S. 448), the jurisdiction of the Federal Courts is not exclusive. State courts have concurrent power to do so (*Charles Dowd Box Co. Inc.* v. *Courtney*, — U. S. —, 7 L. ed. 2d 483; *Minkoff* v. *Scranton Frocks*, 172 F. Supp. 870 [S. D. N. Y.]; *McCarroll* v. *Los Angeles County District Council*, 315 P. 2d 322 [Cal.], cert. den. 355 U. S. 932). Of course, it is federal law which is applied and enforced, whether in the state or federal forum (*Charles Dowd Box Co., Inc.* v. *Courtney*, — U. S. —, 7 L. ed. 2d 483; *Local 174, Teamsters, etc.* v. *Lucas Flour Co.*, — U. S. —, 7 L. ed. 2d 593). Since the rights asserted by Budget in oppo-

[27] Taft Hartley Act, Section 301, 29 U. S. C. A. § 185.

sition to the motion to confirm the award for $13,759.49 stem from a federal statute, Budget, after its motions for leave to appeal to the New York Court of Appeals had been denied, could have applied to the U. S. Supreme Court for a writ of certiorari to review the determination of the Appellate Division (28 U. S. C. § 1257[3]; *cf. Fox Film Corp.* v. *Muller*, 296 U. S. 207). It failed to do so and its time to make such application has long since expired (28 U. S. C. § 2101[c]).

Thus, it is plain that the legality of the payments under Section 302 could have been—and, indeed, were—tested and determined in the state forum. And, it is against this backdrop that the doctrines of *res judicata* and collateral estoppel must be considered.

Once a matter has been litigated, the duel may not, thereafter, be renewed between the same parties, whether in the same or a different forum (*E. V. Prentice Machine Co.* v. *Associated Plywood Mills*, 252 F. 2d 473, 476 [C. A. 9]; *Schuykill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N. Y. 304).

> "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment."
>
> *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 597.

And the judgment is conclusive not alone as to matters litigated but also to matters which could have been litigated, provided that their identity is such that a different judgment in the second action would impair rights created by the first (*Schuykill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N. Y. 304, 306-307).

We turn first to the award for $13,759.49. There, the Union and Budget were opposing parties. The cause of

action was the same, for Budget's claim, although advanced by way of defense, involved the legality of the award under Section 302. The basis there urged for illegality is the same basis here urged upon the Court. The issue litigated was identical. By consequence, the determination there rendered is final and wholly dispositive of the contention here advanced by Budget.

Insofar as concerns the awards for $44,000 and $17,480.97, the alleged illegality of the payments to the Funds under Section 302 was never specifically raised by Budget. Necessarily, therefore, the question is presented: Does the doctrine of *res judicata* bar the raising of that issue here?

As we have hitherto indicated, *res judicata* is applicable not only to matters actually litigated, but also to any matters which might have been so litigated (*Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591; *Schuykill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N. Y. 304; *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89). However, the applicability of the doctrine is dependent on whether "the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first" (*Schuykill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.*, 250 N. Y. 304, 307; *Statter* v. *Statter*, 2 App. Div. 2d 81 [N. Y.]).

In determining the measure of identity of the two causes of action, form is unimportant. What is controlling is whether the rights created by the judgment in the first action would be destroyed or impaired by a contrary determination in the second.

The "Restatement of the Law of Judgments" (§ 61, p. 240), notes that the controlling factor in determining the identity of the two causes of action is whether "the evidence

needed to sustain the first action would have been sustained the second action."

However the situation may be viewed, it is clear that the identity between the award of the Impartial Chairman for $44,000 and the judgment confirming the award for $17,480.97, with the claims advanced by Budget in respect thereto in this action is such that a different judgment in this action would destroy the rights established both by the award and the judgment. The award (which could have been the subject of a motion to vacate, but was not) and the judgment (the opposition to which was most strenuous), established the rights of the Funds to the payments in question. A contrary determination in this action would destroy the rights thus created. Indeed, *the very purpose of this action is to destroy the rights created by the award and the judgments.*

The doctrine of *res judicata* is applicable to awards rendered by an arbitrator as well as to judgments rendered by a court (*Abrams* v. *Macy Park Construction, Inc.*, 282 App. Div. 922 [N. Y.]; *Hall* v. *Sperry Gyroscope Co.*, 130 N. Y. S. 2d 505 [N. Y.]; *N. Y. Lumber and Wood Working Co.* v. *Schneider*, 119 N. Y. 475).

Since the claims here raised by Budget could have been litigated in these prior proceedings, it is plain that the doctrine of *res judicata* is a complete and absolute defense to this action.

But, the doctrine of *res judicata* is not limited solely to "direct estoppel". Collateral estoppel by judgment is one of its facets. More limited in scope, for it bars only issues actually litigated and judicially determined (*Statter* v. *Statter*, 2 App. Div. 2d 81 [N. Y.] ), it too, bars Budget's present suit. The fact is that the issue of the legality of the payments under Section 302 *was actually raised and litigated* in connection with the award of $13,759.49. It was disposed of in the decision of the New York Supreme

Court. It was the only question raised by Budget on its appeal to the Appellate Division, which unanimously affirmed the judgment. Leave to appeal to the New York Court of Appeals was denied and no application for certiorari to the United States Supreme Court was made, although such an application could have been made. These state court decisions have determined the issue. It may not now be relitigated. Budget may not now use the federal courts as an instrument for compelling the return of monies which the Impartial Chairman and the New York courts have required Budget to pay to the Funds.

Although in our discussion of *res judicata* and collateral estoppel, we have relied, in part, on New York cases, federal law coincides therewith (*Cromwell* v. *County of Sac*, 94 U. S. 351; *New York Life Insurance Company* v. *Bangs*, 103 U. S. 780; *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89; *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591; *Clinton Engines Corp.* v. *Briggs & Stratton Corp.*, 175 F. Supp. 390 [E. D. Mich.].

Moreover, the United States Courts have pointed out that whether a state court judgment is *res judicata* with respect to an action brought in the federal court must be determined under state law (*Angel* v. *Bullington*, 330 U. S. 183; *Frost* v. *Bankers Commercial Corp.*, 194 F. 2d 505 [C. A. 2]; *Williams* v. *Green Bay and W. R. Co.*, 68 F. Supp. 509 [S. D. N. Y.]; *Ray* v. *Hasley*, 214 F. 2d 366 [C. A. 5]).

## CONCLUSION

**No novel question is presented by this case. The decisions of the courts of appeal with respect to the issue here involved are not in conflict but, to the contrary, are in accord. The determinations, both of the District Court and the Court of Appeals, do not conflict in any way with applicable decisions of this Court. Moreover, there is absolutely no merit to petitioner's application. Accordingly, the petition for a writ of certiorari should be denied.**

Dated: July 25, 1962.

Respectfully submitted,

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## Appendix

Section 302, National Labor Relations Act, as amended (29 U. S. C. § 186)*

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employes any money or other thing of value.

(c) The provisions of this section shall not be applicable * * * (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; * * * or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or

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* This section was amended, in respects not here germane, by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act). The amendment became effective on September 14, 1959. Since this action was commenced on August 6, 1959, and relates to payments due on or prior to January 31, 1958 we set forth the law as it existed at that time.

hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.